# In the Supreme Court of the United States.

DECEMBER TERM, 1863.

THE STEAMER COTTON PLANT } No. 223.
AND CARGO.

*Appeal from the District Court of the United States for the Eastern District of Pennsylvania.*

BRIEF FOR THE UNITED STATES.

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### STATEMENT.

The steamer Cotton Plant was captured as prize on the 10th of May, 1865, at Halifax, on the Roanoke river, North Carolina. The cargo on board consisted of cotton, brandy, and a few dry goods. The cotton and brandy were of southern growth and manufacture. (Record, p. 4.) There was also captured, along with the steamer, sixty-one bales of cotton, which had been recently landed by this steamer and stored in a barn on shore for safe-keeping. (*Ibid.*, pp. 20, 22.) Michael McMahon, of Halifax, is claimant of the steamer and cargo, and of the cotton found on shore.

The evidence shows that, from the beginning of 1862 until the surrender of General Lee, the Cotton Plant

was in the service of the Rebel Government, and had been used in actual hostilities against the United States, (*ibid.*, p. 2;) that at the time of capture she had no flag on board, but the last she had was the rebel ensign, (*ibid.*, p. 3;) that after the surrender of General Lee the steamer was delivered over to her alleged owner, McMahon, who was a citizen of the United States, but resided at Halifax during the war, and was employed in the commissary department of the Confederate Government. (*Ibid.*, p. 20.) By him she was employed "to protect his cotton and other property from the disbanded soldiers of Lee, and from raids by the United States forces." (*Ibid.*, p. 19.) He intended to go down the river to Plymouth, "the object being to get a clearance from the United States authorities at Plymouth, and carry the vessel and cargo to Norfolk, for the purpose of saving both for the benefit of the owner," McMahon. (*Ibid.*, p. 20.) There is no evidence that McMahon had any license to carry on trade.

But there is evidence that the steamer and cargo belonged to the Confederate Government. So the officer in charge testifies. (*Ibid.*, p. 2.) And Jenkins, the fireman and assistant engineer on board, testifies that "the cotton and brandy were purchased with the funds of the Confederate Government," which shipped them and the rest of the cargo belonged to McMahon. (*Ibid.*, p. 4.)

ARGUMENT.

I. McMahon's residence within the rebel lines rendered him liable to be treated as an enemy, and his property to capture as enemy's property.

Prize Cases, 2 Black, 635, 674.

Alexander's Cotton, 2 Wallace, 404.

Besides this, he was in the service of the rebel authorities, his vessel was used by them, and, according to Jenkins's statement, under a charter-party. (Record, pp. 3, 20.)

II. At the time of the capture, war still existed between the United States and the rebels, and captures of enemies' property could still be made.

(1.) Generals Lee and Johnston had surrendered in April, 1865, but General Richard Taylor did not surrender Mobile till May 4, six days before this capture, and General Kirby Smith did not surrender until after it, May 23. These are historical facts of which the court will take judicial notice. (See the compilation entitled "Acts of Congress and Rules and Regulations prescribed by the Secretary of the Treasury in pursuance thereto, with the approval of the President, concerning commercial intercourse with and in States and parts of States declared in insurrection," etc., edition of 1868, pages 94 to 98.)

(2.) No competent authority had declared the war to be over in North Carolina at the time of the capture.

By the President's proclamation of August 16, 1861, issued under authority of the act of July 13, 1861, § 5, (12 Stats. at Large, 257,) declaring certain States and parts of States to be in insurrection, and forbidding commercial intercourse therewith except under special license, exception was made of territory "from time to time occupied and controlled by the forces of the United States." This exception was revoked by proclamation March 11, 1863. No proclamation was issued by the President even restoring unrestricted commercial intercourse until June 24, 1865. What is called by the appellants the President's proclamation of April 29, 1865, was only an executive order regulating further, commercial intercourse with the rebels. Regulations in pursuance of this order were established by the Secretary of the Treasury and approved by the President May 9, the day before this capture. The very fact that regulations were still imposed shows that commercial intercourse was not unrestricted. They revoke anything in General Schofield's orders to the contrary, and are proof that the President considered this section of the country to be still in a state of insurrection.

War, therefore, still existed, and this capture, to use the words of Lord Tenterden, was "a hostile seizure, made, if not *flagrante*, yet *nondum cessante bello*."

Elphinstone *vs.* Bedreechund, 1 Knapp, 316.

III. The steamer was not engaged in lawful trade. The proclamation of President Lincoln of March 31, 1863, declared that commercial intercourse with the States in insurrection, not licensed, would remain unlawful, "until the insurrection shall cease or has been suppressed, *and notice thereof has been duly given by proclamation*." This must mean the proclamation of the President as commander-in-chief. General Schofield, a subordinate military commander, had no authority to remove these restrictions and invite the resumption of general commercial intercourse.

The regulations of May 9, 1865, established restrictions with which it is not pretended that the claimant complied. The fact that the object of the voyage was to go to Norfolk to save the vessel and cargo to McMahon, would seem to indicate a consciousness of insecurity and illegality incompatible with the appellants' position that McMahon was honestly engaged in what he supposed was legitimate trade.

IV. The evidence that the cotton and brandy on board belonged to the Confederate Government, although contradicted by the claimant's witnesses, is entitled to great weight. It is the statement of one on board who was likely to know; and is supported by the action of the captors in restoring the dry goods to McMahon, but keeping the rest.

By a statute of the rebel Congress, passed February

6, 1864, (and which is matter of history,) the exportation of cotton, tobacco, military and naval stores, &c., was forbidden, except under regulations therein prescribed, and penalties were imposed for putting any of these articles on a vessel or vehicle for transportation beyond the rebel territory, and also, for collecting the same with the purpose of so transporting them, but special authority was reserved to the rebel government to export them.

Public Laws of the Confederate States for 1863–'64, pp. 181, 182.

It is a matter of historical knowledge that this law was pretty strictly enforced. How this cotton was collected does not appear, except that the cotton in Urquhart's barn was landed by this steamer Cotton Plant, and this must have been very recently, as the steamer had been but very lately restored to McMahon, and during that time had been employed in protecting this cotton. The natural supposition would be, that it had been collected by the Confederate authorities. McMahon had been in the rebel service, and it does not appear at what time he ceased so to be employed. As not only an enemy but as a traitor he is not entitled to any presumptions in his favor, and the manner and purpose of the voyage indicate that he was aware that the cotton was liable to be taken from him.

V. The Roanoke river, where the capture was made, is not inland waters within the act of July 2, 1864. (13 Stat. at Large, 377.) It is a short navigable river, flowing directly into tidal waters.

VI. The cotton deposited in the barn had been recently water-borne, and landed by this same steamer, and was only placed there temporarily to keep it safe. It is claimed by the same claimant as the steamer, and was to be reladen and taken to Norfolk. It was captured as part of the cargo of the Cotton Plant, and although at the time it was taken it was on land, it was subject to capture as prize.

680 Pieces of Merchandise, 2 Sprague, 233.

This case is widely different from that of Alexander's Cotton, 2 Wallace, 404. That was cotton grown on the plantation where it was deposited. No maritime capture was made with it, and there was nothing to distinguish it from any other property on land which is ordinarily exempt from condemnation as prize. This cotton was merchandise, brought by sea, deposited temporarily, and again about to be carried by sea to another port, for sale.

See Wheaton's Int. Law, by Dana, § 355, note.

A. T. AKERMAN,
*Attorney General.*

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## The Steamer "COTTON PLANT" and Cargo, DAVID O. LAWS and MICHAEL McMAHON, Appellants,

*v.*

## THE UNITED STATES.

## CLAIMANTS' AND APPELLANTS' BRIEF.

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*v.*

THE UNITED STATES.

## CLAIMANTS' AND APPELLANTS' BRIEF.

The steamer Cotton Plant, with the cotton on board, and certain cotton seized on land, having been condemned, as prize, by the District Court of the United States for the Eastern District of Pennsylvania, this appeal is taken by the claimants to the Supreme Court of the United States.

The only ground of forfeiture set out in the libel (Record, page 5) is, that the cargo and vessel "were the property of enemies of the United States in the civil war, and as such liable to condemnation."

On the 9th day of April, 1865, General Lee surrendered his army to General Grant.

On the 26th day of April, 1865, General Johnston surrendered his army to General Sherman.

Thus ceased all hostilities and opposition to the United States, in Virginia and North Carolina, and the power of the Government with its correlative duties to protect its citizens and their property were restored.

General Sherman in his special field orders, No. 65, bearing date, Raleigh, N. C., April 27th, 1865, says, "The general commanding announces a further suspension of hostilities and a final agreement with General Johnston,

which terminates the war as to the armies under his command and the country east of the Chattahootche. . . . . Army commanders are to encourage the inhabitants to renew their peaceful pursuits."

General Schofield, in General Orders, No. 31, bearing date, Raleigh, North Carolina, April 29th, 1865, says, "The commanding general has great satisfaction in announcing to the army and people of North Carolina that hostilities within this State have definitely ceased; that for us war is ended, and it is hoped that peace will soon be restored throughout the country. . . . . All are invited to resume their industrial pursuits. . . . . Between the Government of the United States and the people of North Carolina there is peace."

These orders were either authorized by the President, or received his sanction, and being promulgated by his generals, would, of themselves, have all the binding force of a proclamation by him.

All doubt, if any exists on this point, is removed by his own official act.

On April 29th, 1865, the President of the United States issued his proclamation, in which he declared "That all restrictions upon internal domestic and coastwise commercial intercourse be discontinued in such parts of the States of Tennessee, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, and so much of Louisiana as lies east of the Mississippi river as shall be embraced within the lines of the military occupation, excepting only such restrictions as are imposed by Act of Congress." The proclamation also specified certain articles which were forbidden.

This proclamation not only allowed, but invited, "internal domestic and coastwise commercial intercourse" in and between the States, and the different parts of the States, included within its terms.

On the *tenth day of May*, 1865, (Libel, p. 5,) the capture in question took place, on and near the Roanoke river, about one mile below the town of Halifax, and about /30 miles above Plymouth, which lies at the mouth of the river, which is at that point, *inland*, narrow and shallow. An expedition, consisting of the "U. S. steamers Ioscoe, Valley City, and Picket Launch No. 5," started up the river. The Ioscoe did not proceed further than Hamilton, which was fifty miles from the point of capture; the Valley City went up the river to a point thirty-two miles from the point of capture; both vessels stopping at these points for fear of low water. An officer and six men were placed on the Picket Launch No. 5, from the Ioscoe, attended by an armed crew from said vessel. The Launch, with these crews, proceeded up the river to the place of capture, and in disregard of the above-recited proclamation, and instead of protecting the property of citizens, committed the following acts:

1. They seized the steamer Cotton Plant with her cargo then on board.

2. They then proceeded on land to "Urquhart's barn," seized the cotton stored in the barn, and placed it on board a prize steamer called the Fisher, and afterwards placed it on board the Cotton Plant at a point down the river called "Rainbow Bluffs."

3. They carried off the Cotton Plant with the cotton found on board, and that seized in the barn, after emptying out the brandy and restoring the general merchandise on board to Mr. McMahon.

There is no averment, in the libel of a breach of blockade, nor was there any such breach, in point of fact. The vessel "was lying at the mouth of Quankey creek, on the Roanoke

river, about half a mile below the town of Halifax." (Record, page 19.) She was partially loaded. "At the time of the capture of the steamer only part of the one hundred and nine bales of cotton was actually on board; the balance thereof being in a barn on Urquharts' landing." (Record, p. 12.) "The precise amount taken by the captors on said steamer, and the precise amount taken by them from said landing, and put on board said steamer, being unknown." (Ib., and p. 13.) The amount, however, appears on record, p. 20. "There were on board the steamer at the time of her capture about fifty-four bales of sea-island cotton, and four or five bales of middling upland cotton, twelve barrels of apple brandy, dry goods, hardware, boots and shoes, and notions." On record, p. 20, Marcellus Moore testifies that "Michael McMahon had seventy-nine bales of cotton at Urquhart's plantation on the Roanoke river. The said cotton was middling uplands, of good quality, and was stored in said barn by myself, on behalf of Michael McMahon for safe keeping." "The cargo (on the steamer) was stowed in warehouses in the town of Halifax before its shipment on board the Cotton Plant." (Record, p. 20.) Ensign Fairchild, U.S. Navy, called by the claimant, says (p. 17) "there were fifty-nine bales of cotton on board the Cotton Plant at the time of the capture, mostly sea-island cotton." "By the order of Acting Master Brooks, commanding the Valley City, I seized sixty-one bales of cotton which were in Urquhart's barn, on the plantation of a man named Urquhart, situate at Norfleet's Ferry, on the Roanoke river. I was told by the negroes on the plantation that the cotton belonged to Mr. McMahon. Some of the bales were marked 'M.' I do not know whether it was intended as a part of the cargo of the Cotton Plant. It was taken by me on board the prize steamer Fisher, and was transferred to the Cotton Plant at Rainbow Bluffs on the Roanoke river," (p. 81.) "The steamer was bound for Plymouth, at the mouth of the Roanoke

river. She was not consigned to any person there, but Michael McMahon. Thomas Fitzpatrick and myself intended to go down with the steamer in charge of the cargo, the object being to get a clearance from the United States authorities at Plymouth, and carry the vessel and cargo to Norfolk for the purpose of saving both for the benefit of the owner, Michael McMahon. (Record, p. 20.) The brandy was lost, the crew of the capturing vessel got at it, and the U. S. officer had the heads of the barrels knocked in, and the brandy emptied out, to prevent the crew from getting drunk." (Record, p. 4.) The drygoods, &c., were given up to Mr. McMahon. (Ib.) The sea-island cotton was worth $29,025; the uplands, $250 per bale; total, about $50,000. Ensign Fairchild testifies (pp. 17, 18) that it was greatly damaged and rotted by the gross negligence of the captors, "fifty bales of sea-island destroyed or nearly so." The entire lots of cotton were sold as perishable property for $9,440.94; the Marshal retained "to pay taxed costs and expenses," $1,585.87; the balance, $7,855.11 was paid into court. The steamer was valued at $2,500, and was delivered to the claimant on giving bond. The steamer was purchased by McMahon September 1st, 1863, (Record, pp. 18, 21,) was impressed against his will by the Confederates, (pp. 19, 21, 23,) and restored to the owner about the time of the surrender of General Lee, (p. 19.) The cargo belonged to Michael McMahon, (pp. 20, 22.)

## POINTS.

1. No breach of blockade is averred in the libel, or proved, nor was any illegal voyage contemplated. The intended voyage was in accordance with the proclamations hereinbefore recited, "with a clearance from the United States authorities at Plymouth," (p. 20.) It is scarcely necessary to add that "a forfeiture is not incurred until the vessel is

outside the limits of the harbor of the port of her departure." U. S. *v.* The George Darley, 26 Law Rep. 566.

2. The seizure of the seventy-nine bales in Urquhart's barn did not vest jurisdiction in a prize court. The act of Acting Master Brooks, in seizing it on land and in placing it on board another steamer, viz., the steamer Fisher, *after* its seizure, did not change the locus of the seizure; nor did that lot of cotton form any part of the cargo of the Cotton Plant.

"All seizures on land or on waters not navigable must be prosecuted as other common law suits, and can only be removed into this Court by writ of error. Want of jurisdiction in the Court below, however, does not prevent this Court from assuming jurisdiction on appeal for the purposes of reversing the decree rendered by that Court, and of vacating any unwarranted proceedings of that Court." Morris' Cotton, 8 Wallace, 507.

3. The libel does not contain any charge of forfeiture, as to the cotton seized on land, and, therefore, on this ground alone, the decree, *quoad* said cotton is bad, and must be reversed. The libel seeks to condemn "*the said captured vessel* and her said cargo and lading."

4. The steamer "Cotton Plant." The appraisement of this vessel, of "120 tons burden," at $2,500, indicates its character. It was private property, within "the general rule of international law which condemns the seizure of the property of private persons not engaged in actual hostilities, though residing in a hostile territory or region." Per CHASE, C. J., 9 Wall, 540. It had violated no law, nor intended to do so. It was unarmed; only one person, the engineer, was on board, (page 2.) It was preparing for a lawful voyage, with a lawful cargo, under the guarantees of the proclama-

tions of Generals Sherman and Schofield, and the President of the United States. In the origin of the proceedings in the prize court at Philadelphia, the letter of Admiral Radford sets forth, that the vessel and cotton were "captured" "in the *Sounds* of North Carolina, at *Halifax* and Edwards' Ferry, on the Roanoke river, *as property of the Confederate Government*," page 1; and on page 2, Ensign Fairchild deposes, that "he has understood that she was purchased by the Confederate naval authorities at Norfolk, Virginia, and that to the best of his knowledge and belief, she was at the time of the capture, the property of the so-called Confederate government." This allegation, on which this proceeding was founded, was abandoned in the libel.

In U. S. *v.* Padelford, 9 Wall. 531, the Court recognize and affirm the principle ruled in the case of *Mr. Alexander's cotton*, 2 Wall. 404, that *cotton*, "by its peculiar character, and by circumstances," is a species of property outside the general rule of public law, which protects private property; but a vessel engaged, as was the Cotton Plant, was neither from its character, nor its employment, nor under the circumstances, nor its private ownership, prize of war, at the time of its capture. It had been taken away by impressment, from its owner, but it had been restored, and was lawfully engaged in his private business, and as little liable to be seized as prize of war, as his carriage or his cart.

In U. S. *v.* Padelford, *supra*, in quoting the official definition of "*captured property*," by the Secretary of the Treasury, to wit: "property which had been seized, or taken from *hostile possession* by the military or naval forces of the United States," the Court, per CHASE, C. J., says, "This definition must be taken as the interpretation practically given to the Act (Mar. 12, 1863) by the department of the government charged with its execution, and *we think it correct*." This definition is general in its application. Was the steamer "seized or taken from hostile possession?" or was it not seized

and taken from peaceful pursuits, at a time when the armies of General Grant and General Sherman had undisputed and complete control of the place? This point, however, will more properly appear in the next general view.

5. Was the cotton on board the Cotton Plant, prize of war; and, in this connection, was not the entire captures, by the "Picket Launch No. 5," a *raid* rather than a lawful act of war?

*A.* The Act of July 2d, 1864, 2 Brightly, p. 283, pl. 47, provides that "no property seized or taken, upon any of the *inland waters* of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so taken or seized, shall be promptly delivered to the proper officers of the Court, or as provided in this Act and in the said Act approved March 12th, 1863."

Webster defines "*inland*" to be "*remote from the sea.*"

These statutes, which are familiar to the learned Court, provide a system for all such seizures. See Morris' Cotton, supra. It follows that the Court below had no jurisdiction. The property seized in this case should have been "*promptly*" handed over to the agent of the Secretary of the Treasury; in that case, it would not have been grossly injured; and its proceeds, free of marshal's fees, $50,000 instead of $7,500, would have reached the Treasury. But, as it is, the remedy of the claimant in that case is barred by the limitation of two years, and only partial justice will be done by reversing the decree, and ordering the funds to be paid to the claimant; still, it is the only justice which this learned Court can administer to the injured owner.

*B.* The proclamations of generals in command of occupying armies have always, in all civilized countries, been held to be effective, and have been so decided by this learned Court.

The Venice was captured in Lake Pontchartrain, on May

15th, 1862. On 25th April, 1862, New Orleans was captured by Union forces. May 6th, 1862, General Butler issued a proclamation declaring the city to be under martial law. It also announced that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." Held, "the Act of July 13th, 1861, excepting districts occupied and controlled by national troops from the general prohibition of trade, indicated the policy of the government not to regard such districts as in actual insurrection, or their inhabitants, as subject in most respects to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such it draws after it the full measure of protection to person and property, content with a necessary subjection to military government. As far as possible the people of such parts of the insurgent States as came under national occupation and control, were treated as if their relations to the national government had never been interrupted. The revocation of the general exception from the prohibition of commercial intercouse which has just been mentioned, affected in no respect the general principle of protection to rights and property under temporary goverement, established after restoration of national authority. Wherever the national troops have re-established order under national rule, the rights of persons and of property have been, in general, respected and enforced. Vessels and cargoes belonging to citizens of New Orleans, or neutrals residing there, and not affected by any attempt to run the blockade, or by any act of hostility against the United States after the publication of its proclamation, must be regarded as protected by its terms. It results from this reasoning that the Venice and her cargo, though undoubtedly enemies' property at the time she was anchored at Lake

Pontchartrain, cannot be regarded as such after the 6th of May."

The Venice, 2 Wallace, 258.

"The proclamation was the manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any view of subjugation by conquest." Id.

The doctrine of that case covers and rules this. And the proclamation of the President of the United States, not only under the powers vested in him by Congress, but as commander-in chief, excludes the doubt that the generals of armies exceeded their instructions, or acted contrary to his opinion. It would not have added force to either, or all, of the proclamations, if, as in the case of *The Venice* the clause had been added, that private property, embarked in "*coastwise commercial intercourse*" should be held inviolate. That was the necessary logical conclusion from the premise of the proclamations.

*C.* The place of capture, and the State of North Carolina, were "occupied and controlled by national troops," and such control was "actual, not illusory, not imperfect, not transient, but substantial, complete and permanent." The armies of Lee and Johnson had surrendered and dispersed. Generals Grant and Sherman had complete and permanent control of the State, and it was so proclaimed. General Schofield, in command of the department, from Raleigh, April 29th, "announces" that "hostilities within this State have *definitely* ceased;" that "all are invited to resume their industrial pursuits;" and that "between the government of the United States and the people of North Carolina there is peace."

General Sherman, from Raleigh, April 27th, announces the surrender, "which terminates the war as to the armies under his command and the country east of the Chatta-

hootche," and that "army commanders are to encourage the inhabitants to renew their peaceful pursuits."

The President, on April 29th, proclaims that "all restrictions upon internal, domestic and coastwise commercial intercourse be discontinued in such parts of the States of North Carolina, Virginia, &c., as shall be embraced in the lines of the military occupation," &c.

The claimant acted upon these proclamations; they were protectors and guarantees, not snares to decoy property into prize courts or into prize money.

*D.* The naval officers who planned and accompanied the capturing party are presumed to have had notice of the proclamations, and that the place of capture was under the control and protection of the national forces. It is not to be believed that they were ignorant of what was known to every one. It is enough for the claimant that the proclamations existed and took effect, for his protection, prior to the seizure; but it colors the capture darkly—it shows that the captors knew that they were seizing property which it was their duty to defend and protect. The fact that a picket launch, with a few men, composed the capturing party, and ascended the river so far up as they did, shows that they expected no resistance.

*E.* Another significant fact appears on the record. The capture took place on the 10th of May. The letter of Admiral Radford was dated Hampton Roads, July 3d. Why was not the prize "*promptly*" sent in? Where was it for nearly two months? The cotton on board the Cotton Plant when captured, was transferred at Plymouth to the steamer "Egypt Mills," p. 17, "and was then in good condition." Id. The cotton seized in the Urquhart barn was put on board the Cotton Plant at Rainbow Bluffs, p. 18. This also was put on board the Egypt Mills at Plymouth. Ensign Fairchild says, p. 17, "In the latter vessel there was a large quantity of loose corn, and the water washing in and mixing there-

with became very offensive. Nearly all the cotton stowed in the ground-tier of the 'Egypt Mills' was destroyed by the water and corn thus mixed and putrifying. I am of the opinion that there were fifty bales of sea-island cotton on the ground-tier of the 'Egypt Mills' thus destroyed, or nearly so." If the captors really believed that this was a "lawful prize of war," why not have sent it in earlier, and thus prevent the destruction that was going on? Why keep it until the remnant of the property was scarcely worth litigating for? There was no war service—there was leisure. Such conduct, attended with such consequences of loss and destruction, vests no merit in the captors, and deserves no mercy from the Courts.

*F.* If we illustrate this case by supposing that the seizure in question had been made by a squad of soldiers, belonging to the army of General Grant, or of General Sherman, would it not have been illegal, and the offending persons liable to court-martial? And does that supposed case differ in principle or degree from this?

In conclusion we respectfully submit that the decree of the Court below be reversed, and that the fund in court be directed to be paid to the claimants.

THOMAS R. ELCOCK,
WM. L. HIRST,
*Pro Appellants.*